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WORKERS' COMPENSATION: ALTERNATIVES AND REFORM OVERSIGHT

A Report to the Governor and the 54th Legislature

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WORKERS' COMPENSATION: ALTERNATIVES AND REFORM OVERSIGHT

A Report to the Governor and the 54th Legislature

From the

JOINT SUBCOMMITTEE
ON WORKERS' COMPENSATION ALTERNATIVES

Prepared by
Susan Byorth Fox, Researcher

November 1994

Published by
Montana Legislative Council
Room 138, State Capitol
Helena, Montana 59620-1706
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WORKERS' COMPENSATION ALTERNATIVES

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Senator Sue Bartlett	Representative Ray Brandewie
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HOUSE JOINT RESOLUTION NO. 33

A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA REQUESTING AN INTERIM STUDY OF 24-HOUR HEALTH CARE COVERAGE AND OTHER ALTERNATIVES TO THE PRESENT WORKERS' COMPENSATION SYSTEM AND A REVIEW OF WORKERS' COMPENSATION LEGISLATION PASSED BY THE 53RD LEGISLATURE; AND REQUIRING A REPORT OF THE FINDINGS OF THE STUDY TO THE 54TH LEGISLATURE.

WHEREAS, rising medical costs are contributing to the problems in the workers' compensation system and have outpaced increases in the general health care system; and

WHEREAS, the workers' compensation system could incorporate many of the cost-containment measures found in private health insurance plans in order to hold down costs and still provide the necessary medical coverage to workers; and

WHEREAS, there is a national movement toward health care reform that could include mandated employer-provided coverage and government participation in health care coverage and that could include other reforms that may have certain cost-containment advantages but that may also have duplicative coverage and overlapping benefits and administrative needs with the workers' compensation system;and

WHEREAS, other disability programs, including Social Security and programs providing assistance for long-term disability, combined with the passage of the Americans with Disabilities Act of 1990, bring forth other issues that may indicate the need for more comprehensive health care coverage; and

WHEREAS, 24-hour coverage is currently under study in many states as an alternative system for providing cash, medical benefits, or both, to injured workers; and

WHEREAS, 24-hour coverage could remove many medical issue disputes by providing no-fault medical coverage without affecting other workers' compensation benefits; and

WHEREAS, there are many forms of 24-hour coverage that could be explored, including combining workers' compensation and group health insurance claims, while maintaining separate policies, combining work-related and nonwork-related coverage in the same policy, examining employer and worker participation in health care coverage and employer participation in disability coverage, and examining other forms to be explored.

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA:

That the Legislative Council assign an appropriate interim committee to study the feasibility of a 24-hour health care coverage program in lieu of the medical portion of workers' compensation and any necessary corresponding changes in liability coverage and that the study include:

(1) the impact, advantages, and disadvantages to Montana businesses, Montana workers, the existing workers' compensation fund and insurers, and health care initiatives;

(2) possible coordination with any national and state health care reform or with existing health care programs, such as managed care networks;

(3) possible integration with other disability programs, such as Social Security;

(4) a review of the effects of the Americans with Disabilities Act of 1990 on the needs of the workers' compensation system;

(5) a review of the other states that have explored 24-hour health care coverage, such as Florida, Maine, California, Iowa, Colorado, Missouri, Georgia, and Oregon;

(6) an exploration of any pilot projects that could be implemented in Montana;

(7) a review of funding sources available for pilot projects and for other means of implementing workers' compensation alternatives;

(8) a review of the practical and legal problems, such as federal preemption of the Employee Retirement Income Security Act of 1974 (ERISA), and the exclusive remedy component;

(9) a review of options to provide incentives for private sector development of specific plans for 24-hour health care coverage;

(10) a summary of the short-term and long-term fiscal impacts of any proposals;

(11) a review of any studies on 24-hour health care coverage by other workers' compensation departments, the insurance industry, or other groups knowledgeable in health and disability insurance; and

(12) a review of the safety program created under Senate Bill No. 163, the fraud program created under Senate Bill No. 164, the cost containment program created under Senate Bill No. 347, and other programs created and improved by legislation adopted in the 53rd session.

BE IT FURTHER RESOLVED, that the committee report the findings of the study, conclusions, and options for legislative consideration to the 54th Legislature.

INTRODUCTION

Interest in workers' compensation continued during the 1993 Legislative Session as further reform in the workers' compensation system was sought. The Legislature, in House Joint Resolution No. 33, requested an interim study of 24-hour health care coverage and other alternatives to workers' compensation. The resolution also required a review of the many workers' compensation programs created or improved by the 53rd Legislature. The study was prioritized as the number one interim study by the legislators.

House Joint Resolution No. 33 directed an interim committee to study the feasibility of a 24-hour health care coverage program in lieu of the medical portion of workers' compensation and to study any necessary corresponding changes in liability coverage. The resolution suggested that the study include:

> (1) the impact, advantages, and disadvantages [of 24-hour coverage] to Montana businesses, Montana workers, the existing workers' compensation fund and insurers, and health care initiatives;
>
> (2) possible coordination with any national and state health care reform or with existing health care programs, such as managed care networks;
>
> (3) possible integration with other disability programs, such as Social Security [SS];
>
> (4) a review of the effects of the Americans with Disabilities Act of 1990 [ADA] on the needs of the workers' compensation system;
>
> (5) a review of the other states that have explored 24-hour health care coverage, such as Florida, Maine, California, Iowa, Colorado, Missouri, Georgia, and Oregon;
>
> (6) an exploration of any pilot projects that could be implemented in Montana;
>
> (7) a review of funding sources available for pilot projects and for other means of implementing workers' compensation alternatives;

(8) a review of the practical and legal problems, such as federal preemption [by] the Employee Retirement Income Security Act of 1974 (ERISA), and the exclusive remedy component [of workers' compensation];

(9) a review of options to provide incentives for private sector development of specific plans for 24-hour health care coverage;

(10) a summary of the short-term and long-term fiscal impacts of any proposals;

(11) a review of any studies on 24-hour health care coverage by other workers' compensation departments, the insurance industry, or other groups knowledgeable in health and disability insurance; and

(12) a review of the safety program created under Senate Bill No. 163 [Ch. 295, L. 1993], the fraud program created under Senate Bill No. 164 [Ch. 296, L. 1993], the cost containment program created under Senate Bill No. 347 [Ch. 628, L. 1993], and other programs created and improved by legislation adopted in the 53rd session.

The Joint Subcommittee on Workers' Compensation Alternatives (Subcommittee) was appointed after adjournment of the 1993 Legislative Session. The Subcommittee initially received information on 24-hour coverage and the recently enacted workers' compensation reforms. A 24-Hour Coverage Subcommittee was formed.

The complexity and the multiplicity of forms for 24-hour coverage and the fact that only one state, Oregon, had made significant progress in testing 24-hour coverage contributed to the 24-Hour Coverage Subcommittee's conclusion that Montana was not ready for 24-hour coverage. By learning of the Oregon experience, the 24-Hour Coverage Subcommittee members realized that the positive changes that had been made recently in Montana's workers' compensation system were significant and the results were just beginning to manifest themselves. The 24-Hour Coverage Subcommittee believed that the best approach would be to monitor the recent reforms and to take the opportunity to refine the current system, if necessary, before attempting to

formulate an entirely new system. Additionally, the 24-Hour Coverage Subcommittee believed that monitoring Oregon's experience and Montana's recent reforms would be valuable information for legislatures in determining the feasibility of developing a form of 24-hour coverage in the future.

Many 24-Hour Coverage Subcommittee members had hoped that 24-hour coverage would be pursued in a form that would allow the private sector to develop programs and relieve some of the burden on the State Compensation Insurance Fund (State Fund). The discussions revealed that 24-hour coverage is pursued often within a state fund, a direction that the members did not wish to pursue.

The 24-Hour Coverage Subcommittee also believed that health care reform was shaping up to be a long and arduous task at both the state and the federal level. If health care reforms are initiated, they should be reviewed for their impacts before any 24-hour coverage is pursued.

Having concluded the discussion of 24-hour coverage, some of the members expressed an interest in exploring other alternatives to the workers' compensation system and wanted to explore the alternative of an optional coverage system, such as the system in South Carolina. The 24-Hour Coverage Subcommittee requested information on the "opt-out" provisions in the states of South Carolina, Texas, and New Jersey.

The 24-Hour Coverage Subcommittee reported its conclusions to the full Subcommittee, which proceeded to review the reform of the workers' compensation system enacted by the 53rd Legislature. The full Subcommittee received regular updates from the Departments of Labor and Industry, Justice, and Revenue and from the State Fund on the progress of the reform proposals for fraud, safety, medical cost containment, and other related issues. The progress reports enabled Subcommittee members to develop a solid grounding on issues in workers' compensation.

This report is a compilation of information that the Subcommittee members received during the full Subcommittee meetings and from the study of the 24-Hour Coverage Subcommittee. The Subcommittee's function has been one of education of the recent changes in workers' compensation. This report is intended to serve the same function for the legislators and all interested persons as they debate and consider solutions to problems that are brought before the 54th Legislature. It is a resource tool that enables access to specific information regarding workers' compensation issues.* To this end, a summary of the 1993 legislation and a glossary of workers' compensation terms can be found in the Appendices to this report.

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* A companion report is available on the specific issues of the independent contractor exemption and employee leasing firms: see Susan Byorth Fox, Workers' Compensation Emerging Issues: Independent Contractors, Contractor Licensing, and Employee Leasing, Montana Legislative Council, November 1994.

Chapter One

SUBCOMMITTEE ACTIVITIES

The Subcommittee held six meetings: in October and December of 1993 and in February, June, August, and September of 1994. In addition, three working group meetings were held: on 24-hour coverage in May 1994, on the independent contractor issue in June 1994, and on the employee leasing issue in August 1994.

At its first meeting (October 1993), the Subcommittee received a staff overview of the legislation passed in 1993 (see Appendix A) and received reports from representatives of the State Fund, the Department of Justice, and the Department of Labor and Industry on the various workers' compensation programs and reforms that each agency was implementing. Agency representatives gave overviews on the issues of "Old Fund" and "New Fund" (see Glossary in Appendix B) claims liabilities, safety, medical cost containment, the State Fund business plan, fraud, the uninsured employer program and underinsured employer program, and managed care organizations. (Chapter Three presents an overview of the progress in these areas.) The Subcommittee staff presented a general overview of the 24-hour coverage issue.

The Subcommittee met briefly during the November 1993 Special Session to hear from Representative Duane Grimes, sponsor of House Joint Resolution No. 33. The Subcommittee had asked him to speak on the reasons he sponsored the resolution. The Subcommittee also heard from Rick Hill, Chairman, State Fund, regarding the change in the premium collection method.

In addressing the Subcommittee, Representative Grimes said that House Joint Resolution No. 33 was meant to address a concept that was gaining increased attention nationally and for which there were pilot projects being pursued: 24-hour coverage. He believed that the resolution encouraged Montana to pursue options that would allow private industry to develop specific aspects of the 24-

hour coverage concept. At the very least, the 24-hour coverage approach would send a message to business that the Legislature was willing to consider all viable alternatives. Since 24-hour coverage and health care were closely connected, he believed that it was time for some members of the Legislature to understand the concept and how it might apply to Montana for potential future legislation.[1]

In the February 1994 meeting, the Subcommittee revisited the premium collection issue and received updates on: the Old Fund unfunded liability tax collections from the Department of Revenue; managed care administrative rules, the safety program administrative rules, and administrative assessments from the Department of Labor and Industry; and fraud prevention measures from the Department of Justice.

The Subcommittee was concerned about the fraud issue and interdepartmental coordination. Senator Harp, sponsor of the fraud legislation, stated that he was interested mainly in the cooperation between the Department of Justice and the State Fund and that Senate Bill No. 164 did not include specific efforts for self-insurers (Plan No. 1) or private companies (Plan No. 2). He hoped that the other plans could be brought in at a later date. Subcommittee members also stated their concern about the uninsured employers program and the underinsured employers program.

The Subcommittee staff presented a report on 24-hour coverage,[2] printed in its entirety in Chapter Two, that includes information on programs in other states, federal health care reform, and Oregon's pilot program. At that meeting, Senator Harp appointed the 24-Hour Coverage Subcommittee to further review this complex issue.

The 24-Hour Coverage Subcommittee meeting in May 1994 included a panel discussion with Sara Harmon, Administrator, Workers' Compensation Division, Oregon Department of Insurance and Finance; Paul Bogumill, Medical Benefits Coordinator, State Fund; Lee Shannon, Senior Director of Marketing, Blue Cross

Blue Shield of Montana; George Wood, Executive Secretary, Montana Self-Insurers Association; and Mike Craig, Research and Planning Director, Montana Health Care Authority. (Chapter Two includes a summary of the panel discussion.)

After the panel discussion, the 24-Hour Coverage Subcommittee concluded that 24-hour coverage raises more questions than it answers and that the cost savings are uncertain. Additionally, the reforms enacted in 1993 need time to work before the state proposes a completely different system. Some members wished to pursue exploring the option of nonsubscription (or "opting out") of workers' compensation as is permitted in the states of South Carolina, Texas, and New Jersey. (Information on this option is included in Chapter Two.)

At the June 1994 meeting, the Subcommittee heard updates on the progress of the various 1993 reforms from many state agency representatives. The 24-Hour Coverage Subcommittee reported that it reached the conclusion that Montana was not in a position to pursue 24-hour coverage at this time, that recent reforms needed additional time to work, and that the Oregon programs should be monitored in order to learn from their experiences. The Subcommittee passed a motion to not pursue 24-hour coverage further.[3]

At the June meeting, Representative Vicki Cocchiarella raised the issue of the independent contractor exemption. She had received numerous complaints on the abuse of the exemption, especially in the construction industry. Representative Cocchiarella volunteered to organize and work with a working group to examine the independent contractor issue in greater detail.

Another problem raised to the Subcommittee was the matter of employee leasing firms. These firms compose a new industry in Montana that has no specific statutory regulation, and the industry, state agencies, and the State Fund have experienced difficulties in interpreting current law and its applications to these types of firms. The Subcommittee decided to dedicate the

August full Subcommittee meeting to the independent contractor issue and the employee leasing issue.*

The Independent Contractor Working Group (ICWG) met on June 28, 1994. The ICWG was composed of Representative Cocchiarella and representatives from the Department of Labor and Industry, the State Fund, the Montana Chamber of Commerce, the Montana Building Industry Association, and the Coalition for Workers' Compensation Improvement. The ICWG developed four options for the full Subcommittee to consider: (1) repeal all independent contractor provisions; (2) leave the independent contractor exemption but do not allow the exemption for the construction industry; (3) delete the independent contractor exemption but include additional exemptions in 39-71-401, MCA, by specific industry or trade; and (4) tighten the definition of independent contractor, require application and renewal fees, increase the requirements for exemption, improve enforcement and penalties for noncompliance or abuse of the exemption, and provide immunity for those who contract with independent contractors and verify their status.

The full Subcommittee dedicated the August 1994 meeting to the independent contractor issue and to the employee leasing issue. The ICWG presented to the full Subcommittee a summary of the discussion of the problem and the options that were developed. A significant amount of testimony was received, and there was considerable discussion. The Subcommittee did not take any action, but it encouraged the interested persons to continue to work on solutions.

The Subcommittee staff presented a brief overview of the employee leasing situation, and the Subcommittee heard testimony on the issue. Representatives of "professional employer organizations" (PEO) introduced and explained the concept of coemployment to the Subcommittee. The basic areas of concern identified by the Subcommittee and those testifying included the distinction

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* A full compenion report is aveilable on the issues of independent contractors, employee leasing, and licensing of contractors: see Susan Byorth Fox, Workers' Compensation Emerging Issues: Independent Contractors, Contractor Licensing, end Employee Leasing, Montana Legislative Council, November 1994.

between PEOs and the temporary service industry, the lack of regulation for PEOs, the clarification of each employer's respective responsibilities, the exclusive remedy protections, the question of whether the modification factor follows the place of employment, and employee protections. Senator Bartlett volunteered to work with a group on the employee leasing issue, and a late August meeting was planned.

The Employee Leasing Working Group (ELWG) held a meeting on August 30, 1994, and representatives attended from the Montana Chamber of Commerce, the American Insurance Association, the Department of Labor and Industry, the Montana Contractors' Association, United Staffing of Montana, Personnel PLUS, Inc., the United Staffing Alliance, the Office of the State Auditor, and the State Fund. The meeting was organized in a question-and-answer format that enabled all parties to express their opinions on the areas of concern. A legislator has requested a bill draft for a PEO representative for the 1995 Legislative Session. The PEO representative offered to work with the others to attempt to incorporate their concerns into his bill draft so that the bill would be as close to a consensus bill as possible. Senator Bartlett concluded the meeting by stating that there needed to be licensing and regulation of PEOs and that the issues brought before the working group needed to be addressed in legislation to regulate PEOs. ELWG members agreed to provide their concerns to the Subcommittee staff in writing so that the differences could be shared and settled prior to the 1995 session.

The Subcommittee held its final meeting in September 1994. In discussing the independent contractor issue, certain interested persons had proposed licensing of contractors as a front-end solution to some of the independent contractor problems in the construction industry. The Subcommittee received information from the staff of the Board of Public Contractors, the Department of Labor and Industry, the Montana Building Industries Association, the Montana Contractors' Association, and other interested persons. This information basically outlined a need for some licensing or registration for contractors, but the interested parties had not pursued any change. One possibility that was

offered was to change the Board of Public Contractors to include all contractors and to require proof of workers' compensation coverage and other employer responsibilities as a condition of licensure. The industry representatives agreed to meet and to work with agency personnel on developing a solution.

The Subcommittee also received progress reports from the ICWG and the ELWG. These groups would continue to work on various independent proposals and would enlist the Subcommittee members' support when the groups were prepared to proceed.

The Subcommittee made no final recommendations, but it encouraged the interested parties to meet prior to the 1995 Legislation Session and to jointly develop proposals to solve identified problems. The Subcommittee acknowledged that the educational effort was worthwhile and will serve the Legislature well in the 1995 Legislative Session.

The Subcommittee also received final updates from the Departments of Labor and Industry, Justice, and Revenue and from the State Fund on all of the reform programs. The agency representatives also apprised the Subcommittee of their legislative plans for the 1995 Session. (This information can be found in Chapter Three.)

Senator Harp concluded the final meeting by describing the interim as one of continuing education on workers' compensation issues. The Subcommittee succeeded in uncovering issues that still need to be addressed. Great strides have been made in solving the problems that have plagued workers' compensation; however, there is still a long way to go. The Subcommittee does not offer dramatic changes to the workers' compensation system but does offer expert members who will be able to provide the Legislature with valuable information when the issues of workers' compensation arise during the 1995 Legislative Session.

ENDNOTES

1. Subcommittee on Workers' Compensation Alternatives, Minutes, December 1, 1993, Montana Legislative Council, p. 3.

2. See Susan Byorth Fox, Workers' Compensation, Health Care, and Disability Issues; 24-Hour Coverage as an Alternative, Montana Legislative Council, February 1994.

3. Subcommittee on Workers' Compensation Alternatives, Minutes, June 10, 1994, Montana Legislative Council, p. 17.

Chapter Two

ALTERNATIVES

The Subcommittee studied the issue of 24-hour coverage as an alternative to the traditional form of workers' compensation coverage. The following is the Subcommittee staff report, in its entirety, prepared for the Subcommittee. Although the Subcommittee members received information on the alternative of "opting out", or nonsubscription to workers' compensation insurance, they chose not to pursue the alternative any further than gathering relevant information.

WORKERS' COMPENSATION, HEALTH CARE, AND DISABILITY ISSUES: 24-HOUR COVERAGE AS AN ALTERNATIVE

I. Background

History

Workers' compensation insurance arose out of the industrial revolution in the early 20th century. It was intended to provide assistance for workers involved in industrial accidents. It was seen as an improvement upon common-law principles by providing protection to employers from personal injury lawsuits and by providing medical benefits and wage protection to injured workers.[1] Employees no longer had to prove that their injuries were due to employer negligence or to contend with other common-law defenses that often resulted in minimal recovery with only an occasional substantial recovery against an employer. With the new system of insurance, neither employees nor employers had to participate in a process that was slow and costly to both parties.[2]

In 1911, the first workers' compensation laws in the United States were enacted. Each state and territory, as well as the federal government, has its

own workers' compensation laws. Montana enacted its first workers' compensation laws in 1915 (Ch. 96, L. 1915).

Workers' compensation traditionally is an "exclusive remedy" in which an injured worker gives up the right to sue an employer in return for first-dollar, no-fault medical coverage of any injury resulting from a workplace accident and for wage loss attributable to the injury. The term "workers' compensation" generally covers injuries and diseases; however, under Montana law, the Workers' Compensation Act covers injury from a specific accidental occurrence and the Occupational Disease Act of Montana covers injuries and diseases attributable to the workplace that happen over a period of time without a date and place certain.

At the time that workers' compensation laws were coming into existence, no other social insurance programs existed. There was no unemployment compensation, Social Security, or private benefits of health insurance, retirement, or disability.[3]

From World War I until the Depression, different forms of social health insurance were proposed, and by the 1940s, the precursor to the Blue Cross and Blue Shield plans had been established. A wartime wage freeze had given a boost to employment-based insurance by trading medical benefits for foregone pay raises. From 1949 until the 1990s, there was an ongoing public assumption that between the expansion of the voluntary, employment-based insurance market and Medicare and Medicaid, everyone would be covered by health insurance.[4] The recent rise in medical costs has brought those assumptions into question and, in essence, is what brings the issue full circle to the discussion of health care reform in general and specifically to 24-hour health care coverage in the context of workers' compensation.

The contrast between workers' compensation and traditional health care

The basic objectives underlying workers' compensation are to:

- provide for disability and medical expenses to victims of work accidents, regardless of fault;
- reduce employer and employee litigation costs and the time necessary to resolve claims through an "exclusive remedy";
- encourage maximum employer interest in safety and rehabilitation; and
- study the cause of accidents in order to reduce further accidents and their costs.

Disability expenses include compensation for physical impairment and any resultant wage loss. Rehabilitation benefits are a part of the goal to make an injured person "whole" and able to return to work.[5]

Traditional health care insurance provides access to health care for injuries and illnesses, limited only by the policy purchased, and spreads the risk and medical costs among groups of persons. The emphasis is on medical care rather than on where the injury or illness occurred; return to work is not an issue. Disability and wage loss are treated separately, and rehabilitation is covered by insurance only when purchased as part of a policy or as a separate policy or when covered by other programs, such as Social Security.

Workers' compensation traditionally has been a first-dollar coverage program on a fee-for-service basis, has allowed freedom of choice of physicians, has provided coverage on the first day of employment, and has not included copayments or deductibles. Most traditional employer-based health care insurance has evolved from fee-for-service coverage into preferred provider organizations and managed care networks that provide a limited choice of physicians. Traditional health care insurance also typically includes cost-sharing mechanisms, such as fee schedules, copayments, deductibles, waiting periods, and limits on preexisting conditions.

The nature of workers' compensation insurance may have made it a target for cost-shifting as other health insurance programs use methods to limit costs and expenditures. Some studies have suggested that health care costs have risen faster in workers' compensation insurance than in the traditional health insurance areas, although those studies are based on 1986 and 1987 data that was compiled before many reforms were enacted.[6] Until recently, reforms in the area of health care insurance cost containment have not been a part of the workers' compensation system, and therefore the economic and legal ramifications are still unknown. Montana enacted nontraditional workers' compensation legislation in 1993 to provide for managed care, copayments, and deductibles (Ch. 628, L. 1993).

Motivations for exploring an alternative

Although there are many reasons to seek alternatives to the workers' compensation system, the major motivations for exploring alternative coverage include the existence of multiple social and health care systems; changes in the nature of work, the workforce, and occupational illnesses and injuries; a shift in emphasis from causation to consequence; and the inability to remove litigation from the workers' compensation system.

Another motivation for exploring an alternate system, such as 24-hour coverage, is that workers' compensation developed at a time when there were no social insurance or welfare programs to offer assistance to injured workers. Now there is a myriad of programs, both public and private, for health care, disability, unemployment, etc. State and federal governments and many employers provide or participate in more than one form of coverage and can see potential for administrative savings. The development of multiple systems has created many gaps and overlaps in coverage, and in tough economic times, the concept of integration or coordination is a logical evolution, at least in theory. With the difficulty of obtaining and affording health care insurance or of affording health care even with insurance, workers' compensation insurance may be bearing a disproportionate share of a societal problem.

Cost-containment strategies are appearing in traditional health care systems, and as those who provide workers' compensation watch costs rise, those same cost-containment measures are appealing and are becoming a necessity to control the costs of doing business.

At the turn of the century, the nature of work was very different and so was the workforce. Traumatic accidents were the most prevalent source of work-related injuries, and diseases were not compensated.[7] Since that time, the industrial nature of work has changed and the service sector has grown tremendously. Technology now performs many tasks and, in turn, has created new tasks with associated risks to workers and to society. The workforce has a different balance of people in terms of gender and age. The workforce includes more women and is older as a whole. There has also been a growth in leisure time and leisure activities, making the distinction between occupational and nonoccupational injuries less clear. The result of these combined factors has made the cause and definition of injury and disease more difficult to assess.

Compensation for diseases entered the system because of work-related diseases, such as silicosis and miner's "black lung". Occupational disease now involves questions of whether such conditions as repetitive motion and stress are compensable or not. Compensation for injury has evolved to include back disorders that may have concomitant causes in the aging process and activities that are not work-related. The Occupational Disease Act of Montana, enacted in 1959, illustrates that the problems of causation have been with us throughout the history of workers' compensation and, as time evolves, have become more complicated.

Philosophical motivations to explore alternatives include a shift from an emphasis on causation to an emphasis on consequence. Health care costs are driven by the consequences of injuries and illness. It is only when redress is sought that causation is at issue because determining cause determines responsibility. If national health care reform or state health care reform

revolves around the consequences of illness and injury, workers' compensation will have to adjust its "causation" system within the greater "consequence" system.

One historical motivation for establishing workers' compensation insurance was to remove fault and negligence from the causation argument and to reduce the argument to whether the cause was occupational or nonoccupational. The intention of workers' compensation insurance was to mitigate the need for litigation to determine the cause and to mitigate its costs. Workers' compensation claims were intended to be removed from the tort system through exclusive remedy. However, workers' compensation developed its own court system to handle claim disputes. Montana's Workers' Compensation Court was established in 1975.

In conclusion, parallel medical, benefit, and litigation systems now exist in society and it appears that workers' compensation no longer addresses its basic objectives. The interest in 24-hour coverage is an outgrowth of the search for alternatives.

II. Overview of 24-Hour Coverage

Concept and variations

The concept of 24-hour coverage is to provide broad-based health and disability benefits to workers regardless of how an injury, illness, or disability arises. The objective is accomplished through coordination or integration of coverage and benefits currently being received through workers' compensation insurance with coverage and benefits provided by other public and private insurance programs. There are generally six variations of what is commonly called "24-hour coverage".[8]

All variations address, either by inclusion or exclusion, the issues of management, medical benefits, disability benefits, coverage for occupational-

related injury or disease, or both, and coverage for nonoccupational injury or disease, or both. This discussion does not address health care coverage of an employee's family by an employer. The six variations are listed below, and each has a simplified statement of the major difference from Montana's current workers' compensation system.

(1) 24-hour coverage *marketing product*

This is integrated management of separate policies of workers' compensation and group health insurance claims and/or group health discounted provider rates. There is some experience with actual implementation of this variation because it has been offered at different times by private insurance companies. This alternative could be seen as the least comprehensive version.

- Major difference from current system: combined administration only.

(2) 24-hour *medical* coverage

This is integrated management of medical benefits for both occupational and nonoccupational injuries. This variation includes medical benefits for all of an employee's injuries and diseases and disability benefits only for work-related injuries and diseases.

- Major difference from current system: adds medical benefits for nonoccupational injuries and diseases.

(3) 24-hour *disability* coverage

This covers disability benefits for all of an employee's injuries and diseases, but medical benefits would be provided only for work-related injuries and diseases.

- Major difference from current system: adds disability for nonoccupational injury and illness.

(4) 24-hour coverage of *accidents (injuries)*

Medical and disability benefits are provided for all accidental injuries, but only work-related diseases are covered.

- Major difference from current system: adds nonoccupational injuries only for medical and disability.

(5) 24-hour coverage of *diseases*

Medical and disability benefits are provided for all diseases, but only work-related injuries would be covered.

- Major difference from current system: adds all diseases (occupational disease statutes unnecessary).

(6) 24-hour *medical and disability* coverage

Medical and disability benefits are provided for all diseases and injuries. This variation is closest to what is currently being called "universal coverage".

- Major difference from current system: adds nonoccupational injury and disease.

Potential advantages of 24-hour coverage

The potential advantages to a system of 24-hour coverage, depending on the variation, include:

(1) cost control of medical and hospital services;

(2) administrative savings;

(3) structural efficiencies in covering gaps and avoiding duplication and overlapping services;

(4) provision of a single source of care;

(5) provision of a single fee schedule;

(6) risk sharing, which may encourage an employee's return to work; and

(7) a more user-friendly system, with providers dropping unnecessary and duplicate tests, treatment, and costs.

Potential questions, impediments, and disadvantages to 24-hour coverage

Disadvantages are hard to define specifically, but the impediments to developing a 24-hour coverage system and the questions that are raised point to the areas in which potential disadvantages could appear. The overall disadvantage of trying to create a new system from many existing systems is the potential of creating another layer of administration without realizing any efficiencies or savings. Other possible questions that arise and disadvantages include the following considerations:

(1) The implications of the ERISA must be addressed. ERISA exempts certain employers from state regulation of state insurance laws. This federal preemption may cause a state to give up its right to regulate the health insurance component of workers' compensation for certain employers when establishing a 24-hour coverage program.

(2) The "exclusive remedy" protection of employers from tort action may be in jeopardy because of employee contribution ramifications. (The 1993 changes in statute may already present the Montana system with this situation.)

(3) The differences between workers' compensation medical benefits and group health insurance coverage may present coordination difficulties and could require changes (i.e., an increase or decrease in benefits) in one system or the other.

(4) There is a concern regarding benefit reduction and legal protections for workers (legal and socioeconomic concerns).

(5) The decision of whether to include the disability and indemnity portion of workers' compensation insurance in 24-hour coverage must be made. If disability is separated from medical coverage, does the employer lose the back-to-work incentive? Does exclusion offset administrative savings by still having two systems?

(6) There are potential administrative difficulties because of the Occupational Safety and Health Act of 1970 (OSHA), the ADA, data reporting requirements, state and federal regulations and statutes, disability benefits, and required legislative changes.

(7) There are federal tax law differences that currently exist for the different kinds of programs.

(8) There is the question of how to determine premium rates. For example, if community rating is used to establish rates, what happens to the experience rating for employers?

(9) Will cost containment work with the workers' compensation mix of injuries and illnesses?

(10) Is there an effect of cost containment on disability rates?

(11) How would the system work for multiwage earners and job holders?

(12) If 24-hour coverage is mandatory, what is the economic effect on employers?

(13) What happens to the safety incentive for employers?

(14) Where would the adjudication of workers' compensation insurance claims take place? Would the Workers' Compensation Court be abolished? Would the new system allow for tort action? Would the Workers' Compensation Court cover disability claims only?

(15) What happens to the reserves of workers' compensation insurance providers?

(16) Is the issue of causation addressed?

(17) What combination of workers' compensation medical coverage, workers' compensation disability coverage, health care coverage, and automobile insurance medical coverage would be included?

Many of these impediments and questions will need to be addressed at both the federal and state levels as health care reform develops. Cost containment measures in workers' compensation will raise many of these same issues.

Other states and 24-hour coverage

This information was gathered from the Report to the Legislature on Twenty-Four Hour Coverage, prepared by the Minnesota Department of Commerce and the Minnesota Department of Labor and Industry, February 1993, and updated when possible with information from a January 1994 telephone survey by the

Subcommittee staff. The following states have been referenced in various articles as considering or studying 24-hour coverage.

California

The Garamendi Plan, named after California Insurance Commissioner John Garamendi, proposed to combine the health care components of workers' compensation insurance, automobile insurance, and other health insurance into a single plan. The program would have been funded by both employers and employees. The legislation for this plan was vetoed in October 1992. President Clinton's health care reform task force modeled some of its plan from this proposal.

In 1992, California passed legislation (AB 3757) that authorized pilot projects for employer choice of health care providers for workers' compensation. This legislation allows employers to contract with a single network of providers for both general medical care and workers' compensation.[9] Premiums are paid to workers' compensation carriers that contract with the health care providers who provide the general health care component. In 1993, cleanup legislation (AB 1692) was adopted broadening the scope of the 24-hour pilot program and clarifying the evaluation process. In January 1994, the pilot program was in four counties and was accepting applications from employers and health care providers. The final regulations have been adopted. The first application made was from Kaiser Permanente in San Diego County, which includes eight employers ranging from county government to small private business. The pilot project is authorized for 3 years.[10]

Colorado

Legislation has been introduced each session since 1991 to provide options to workers' compensation, such as limited 24-hour coverage and elective workers' compensation coverage. None of the legislation had been successful through January of 1994, and at that time it was unknown whether legislation would be introduced in the 1994 session. It appears that the 24-hour coverage issue

has become overshadowed by health care and workers' compensation reform in general.[11]

Florida

Florida enacted legislation in 1989 enabling an integrated policy for medical coverage and a separate policy for indemnity coverage. Programs were not developed at that time because of legal questions regarding exclusive remedy and ERISA. Amendments, effective January 1, 1994, were enacted in the November 1993 Special Session that allow the study of the parameters to set up pilot programs for 24-hour coverage.[12]

Maine

Enabling legislation was passed in 1991 to allow for a 24-hour coverage pilot project. A proposed Bureau of Insurance regulation did not pass the first review, but there are insurance companies that have been inquiring into pilot projects. The Superintendent of Insurance was actively pursuing the passage of the insurance regulation to allow the pilot projects to begin.[13]

Massachusetts

Legislation has been enacted that allows employers and employees to adopt 24-hour health care coverage plans through collective bargaining agreements. The law does not allow the use of deductibles or copayments. Medical coverage may be provided through a health insurance policy or self-funded health plan. Up to 10 pilot programs may be authorized by the Division of Insurance, effective July 1, 1993.[14]

Minnesota

Minnesota enacted legislation in 1992 that provided for reform in the workers' compensation system. It mandated that the Commissioners of the Department of Commerce and Department of Labor and Industry study the feasibility of providing the medical portion of workers' compensation through other mechanisms and focus attention on the concept of 24-hour coverage. A

February 1993 Department of Commerce and Department of Labor and Industry report recommended the following approach:

(1) wait until the Oregon pilot program has been implemented and use it as a basic guideline;

(2) develop a computer model program based on Oregon's program but compatible with Minnesota's needs;

(3) adopt and implement a pilot project after analysis of model results; and

(4) review the results of managed care in the Minnesota workers' compensation assigned risk plan and/or the state health plan.[15]

Oklahoma

In 1993, Oklahoma passed legislation (HB 1447) enabling the Insurance Commissioner to develop a pilot program of integrated management of employer workers' compensation and group health care claims. The program is in its early planning stages and still requires substantial research by the Oklahoma insurance department.[16]

Oregon

Oregon was the first state to receive a Robert Wood Johnson grant for planning a program for 24-hour coverage pilot projects. In early August 1993, Oregon passed enabling legislation to allow pilot projects for 24-hour coverage. The administrative rules implementing the act were passed in late December 1993, and the first plan was implemented January 1, 1994. More plans with different businesses and insurers were expected to be approved by the first of March and again by early summer. It is hoped that approximately six pilot plans will be approved. The first plan implemented was between the State Accident and Insurance Fund (SAIF) and Blue Cross Blue Shield. This pilot plan includes more than one employer and may cover up to 5,000 employees. The Department of Consumer and Business Services is collecting data and will begin an evaluation after the first year of the pilot plans' operations.[17]*

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* See the summary of the 24-Hour Coverage Subcommittee panel discussion on page 28 for updated information on Oregon.

III. The Other Alternative to Workers' Compensation Insurance

Currently, one other alternative to workers' compensation insurance exists. South Carolina, Texas, and New Jersey have elective workers' compensation coverage. Workers' compensation insurance is required unless an employer rejects coverage through a formal process. The employer is then subject to suit without the traditional common-law defenses.

Colorado recently rejected this option, and the Montana Legislature rejected the option in the 1993 Regular Session when House Bill No. 455 died on second reading in the House of Representatives. House Bill No. 455 was patterned after the Texas statute. In the legislation, an employer would have to give notice to the Department of Labor and Industry or its insurer of its intention to withdraw from workers' compensation coverage. The employer also would have to notify its employees of the employer's intention. By withdrawing from workers' compensation coverage, the employer's common-law defenses would be limited and the employees would be allowed to sue the employer for damages for personal injuries or death.

IV. Federal Health Care Reform and Workers' Compensation

There were two basic components to President Clinton's health care reform plan that were related to the medical portion of workers' compensation coverage. The first, a proposal for reform, was a coordinated approach to health care and workers' compensation; the second was the formation of a study commission to study a merger approach to health care coverage and workers' compensation insurance.

The first component was included in the proposed Health Security Act. The proposal took a <u>coordination</u> approach to medical benefits and workers' compensation. Individuals with work-related injuries would receive medical treatment through their chosen health plan. A health plan would be chosen by the worker from the plans that have been approved by the regional health

alliances. The regional health alliances would be large mandatory purchasing groups through which all basic health insurance would be purchased. All health plans would be required to provide a "point-of-service" option under which a consumer could choose to go outside the plan network (e.g., to a fee-for-service plan); however, the consumer would probably pay more. All health plans would be required to be certified for their ability to treat work-related injuries. A workers' compensation case manager would be designated by the alliance, each plan, and each insurer to coordinate treatment and rehabilitation.

The health plan would be reimbursed according to a fee schedule or other negotiated schedule by the workers' compensation carrier who covers individual employers. The goal would be to maintain the exclusive remedy by employers paying copayments and deductibles. (This is different from the recently enacted Senate Bill No. 347 (Ch. 628, L. 1993), which may be preempted by federal law in the future or which may have to be reconciled with federal law.) Employers would pay premiums to their carrier, and the carrier would pay the health plan. Self-funded workers' compensation insurers would pay for treatment based on state laws and would reimburse the health plans for services.

The second component of the President's plan was the creation of the 15-member federal Commission on Health Benefits and Integration (Commission). The Commission is co-chaired by the Secretary of Health and Human Services and the Secretary of Labor and is directed to study the issue of the merger of the medical portion of workers' compensation, health care, and medical coverage of automobile insurance (reminiscent of the Garamendi Plan in California). The study is to be completed by July 1, 1995.

Although cautious regarding the coordinated approach, employer, business, and insurance interests seem to perceive savings in this area, and most are not opposed. On the other hand, employer, business, and insurance groups are opposed to the merger approach because of the loss of control over the back-

to-work elements of the medical system, the loss of safety incentives, and the loss of experience rating in the setting of premium rates.

24-HOUR COVERAGE SUBCOMMITTEE PANEL DISCUSSION

The 24-Hour Coverage Subcommittee met May 20, 1994, and provided a forum for a panel discussion by Sara Harmon, Administrator, Oregon Workers' Compensation Division; Paul Bogumill, Medical Benefits Coordinator, State Fund; Lee Shannon, Senior Director of Marketing, Blue Cross Blue Shield of Montana; George Wood, Executive Secretary, Montana Self-Insurers Association; and Mike Craig, Research and Planning Director, Montana Health Care Authority.

Excerpts from the Minutes from the meeting follow.* The comments made by Ms. Harmon are presented in greater detail than the other participants because the information from Oregon was a crucial factor in the decision made by the 24-Hour Coverage Subcommittee.

> Ms. Harmon said that 24-hour coverage is a complicated topic to discuss because everyone has a different idea of what 24-hour coverage is. The extreme of 24-hour coverage is a total dissolution of the boundaries within workers' compensation, both medical and indemnity, and all other health insurance, health plans, and disability plans.
>
> On the other end of the scale is a more moderate version of 24-hour coverage . . . a coordinated model in which two separate systems--the health care system and the workers' compensation system--are maintained. The two systems are coordinated by having one panel of service providers providing care under both plans, and the two plans are talking to each other.
>
> Ms. Harmon said the Subcommittee must ask itself why it is even talking about 24-hour coverage? One of the reasons to talk about 24-hour coverage is to get a handle on the costs associated with medical coverage and workers' compensation, since both costs are increasing. Other reasons to talk about 24-

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* The complete text of the Minutes is available from the Montana Legislative Council. See Subcommittee on Workers' Compensation Alternatives, Minutes, May 20, 1994, Montana Legislative Council.

hour coverage are the discussion of national health care reform and a fragmented delivery system. . . . Ms. Harmon said that those working in workers' compensation look at 24-hour coverage as a way to obtain the benefits of managed care, treatment guidelines, and other types of cost containment measures on the group-health side.

Ms. Harmon said there are many obstacles to combining the medical care portion of workers' compensation with health insurance, such as legal obstacles and the fundamental differences between the two systems. The biggest legal obstacle is the Employee Retirement Income Security Act (ERISA). ERISA supersedes "any and all state laws in so far as they may now or hereafter relate to any employee benefit plan". However, ERISA provides exemptions for plans that are "maintained solely to meet workers' compensation requirements under state law". ERISA does not preclude any state from having mandatory workers' compensation programs nor does it allow the states to tell an employer that they must provide health care coverage or tell self-insured employers that they must provide a certain level of benefits. When health coverage and workers' compensation are blended, the closer that they are blended, the further away the plan becomes to "solely meet workers' compensation requirements". It is now a plan maintained for health coverage and workers' compensation purposes. If the plans are merged too closely, the federal government preempts the states' ability to regulate the workers' compensation portion of the plan. This can have serious impacts in that it may do away with exclusive remedy. If Montana were to consider piloting 24-hour coverage, Ms. Harmon recommended that it get excellent legal advice before it undertakes the project.

Ms. Harmon said the goals of the health coverage system and the workers' compensation system are not the same. The goal for workers' compensation is for the medical service provider to get a worker back to work. This is not the goal in the health insurance system. She said it sounds good to combine health coverage and the medical portion of workers' compensation, but then workers' compensation medical care is disconnected from the concerns on the indemnity side. If both systems do not have the same goal, then the disconnect is very serious. If the goal of the medical service providers, regardless of whether the injury is work-related or an off-the-job injury, is to return a person to work, the disconnect is okay. In addition, if the goals of both systems are the same, the cost of health insurance becomes higher.

Another issue that arises when combining workers' compensation medical and health care is that the natures of the

coverages are different. Health insurance is not portable from the employer to employer; it is on a per-claim basis. Health insurance has co-payments, deductibles, caps, and coverage; typically, workers' compensation does not. Health insurance has a waiting period before the coverage kicks in; workers' compensation does not. Workers' compensations is experience-rated which creates incentive for employers to enhance on-the-job safety; health insurance is not experience-rated. There are also very different benefit packages between the two coverages. Workers' compensation is a very rich package. Health insurance is all over the board and rarely as rich as the workers' compensation package. In addition, workers' compensation includes many different types of medical service providers.

Ms. Harmon said that in 1993, Oregon received a Robert Wood Johnson Foundation grant and legislative authority to pilot 24-hour coverage. The legislation allows the director to set up a pilot program to combine the medical portion of workers' compensation with health insurance. The legislation does not allow Oregon to combine the workers' compensation indemnity portion. Technical parts of the legislation removed some barriers for workers' compensation insurers and health insurers to sell each other's lines of business.

In addition, the pilots cannot take away any benefits or rights of workers. The pilots are allowed some exemptions from the workers' compensation law to help create a smoother administrative process for the pilots. The three approved pilots are exempt from the Oregon specific medical fee schedule. Two of the pilots are using...a resource-based, relative value scale, and the other is using capitation--one fee upfront per person. In addition, the pilots immediately channel workers into a managed care organization (MCO) as soon as the pilot becomes effective.

Ms. Harmon said Oregon has a statutory advisory committee consisting of representatives of workers, employers, attorneys, and health care providers. The committee advises the director on pilot approvals and how to evaluate the success of the pilots. Oregon has three approved pilot programs; two are coordinated and one is integrated.

Ms. Harmon provided a flow chart describing the coordinated administration model. She said the first pilot was with the Oregon State Fund and Blue Cross/Blue Shield. It is maintaining separate insurance coverages for workers' compensation medical and for group health. The Blue Cross plan has an HMO and the State Fund has contracted with a workers' compensation MCO. They share the same circle of providers. It also coordinates by talking with other and having the same fee schedule.

> Ms. Harmon provided a flow chart describing the integrated plan model. She said the integrated model is with Safeway, a self-insured employer that has contracted with Kaiser Permanente as an HMO for health coverage. Kaiser is also a state certified MCO for the workers' compensation portion. Safeway is paying a [negotiated] capitated fee for both workers' compensation and group health. Because they are separate fee arrangements, it keeps the pilot out of harm's way for ERISA purposes. [Safeway is solely responsible for indemnity coverage.] There are 675 people covered by the integrated model and 1,700 covered under one of the coordinated models. The other coordinated model has been approved, but it is still doing its marketing. [Both of the pilot programs were providing health and accident coverage to their employees prior to joining the pilot program.] . . .
>
> In conclusion, Ms. Harmon said the biggest issue is the evaluation of the pilots. Oregon wants to evaluate whether the pilots save administrative costs and what impact they have on return-to-work and on reducing litigation. Oregon also wants to compare the treatment and cost of treatment between the workers' compensation side and group health side and evaluate the satisfaction of the participants. Oregon is in the process of doing a request for proposal (RFP) for research entities to tell them how they would evaluate the effectiveness of the pilots.
>
> Ms. Harmon cautioned the Subcommittee that just because Oregon was positioned well enough, because of where it is in workers' compensation reform, does not mean that Montana is in the same place. She encouraged Montana to learn from Oregon's mistakes.[18]

The remaining panel members' discussion has been summarized and condensed. Paul Bogumill of the State Fund explained how the State Fund is proceeding on cost containment in medical benefits by pursuing managed care organizations. The State Fund staff is most interested in the coordinated approach to 24-hour coverage and, if implemented, could foresee administrative savings and an elimination in coverage gaps and overlaps. The State Fund staff is very concerned that the medical portion of workers' compensation cannot be adjusted separately. Currently, the managed care organizations will assist the State Fund in more effectively administering the State Fund's claim files. In addition, the medical community is being educated as to the needs of the State Fund. Mr. Bogumill reiterated many of the concerns regarding ERISA, conversion privileges, preexisting conditions, safety, and data collection.

Lee Shannon said that Blue Cross Blue Shield views the 24-hour coverage issue as another chapter in health care reform. He recognizes that 24-hour coverage could be an excellent blending of expertise of health and accident insurance and workers' compensation insurance. The advantage of 24-hour coverage is cost containment and lack of duplication. ERISA, mandatory coverage issues, and health care reform will all need to be reviewed if 24-hour coverage is pursued.

George Wood stated that the Montana Self-Insurers Association has not taken a position on 24-hour coverage. The International Association of Industrial Accident Boards and Commissions and the National Council of Self-Insurers have taken a position that in health care reform, workers' compensation should be exempt. Mr. Wood reiterated the differences between health and accident insurance and workers' compensation insurance. He believed that if these benefits are combined, employees may receive less in benefits and pay more. For the employers he represents, he sees no administrative savings.

Mike Craig stated that the Health Care Authority's mandate, Senate Bill No. 285, does not include workers' compensation. It is looking at the extent to which it should include workers' compensation medical costs in trying to quantify what Montana spends on health care. The Health Care Authority and the Subcommittee have similar issues to study, such as preexisting conditions, community rating versus experience rating, cost containment, data collection, and mandatory versus voluntary approaches. Oregon is a state that the Health Care Authority is watching in terms of data collection, and it is watching the pilot programs because of Oregon's advances in health care reform.

Panel members discussed the fact that claims currently are bounced back and forth between health and accident insurers and workers' compensation insurers and the possibility that 24-hour coverage would help mitigate this. Blue Cross Blue Shield staff believes that if workers' compensation and medical plans are experience rated, the plans could be combined and administrative savings would result.

Ms. Harmon said that the nation is moving towards community rating, which will place a greater distance between the administration of workers' compensation and medical coverage. Oregon has the advantage because the Insurance Commission, which has authority over workers' compensation, and health and safety regulation are all in one agency, which positions Oregon well for 24-hour coverage.

The Subcommittee members were concerned with the separation of the medical benefits from the indemnity benefits. Ms. Harmon said that the Oregon plans were small, and therefore, it was fairly easy to control the relationship between medical benefits and indemnity costs. Oregon had already established and operated managed care organizations and had educated medical providers about the needs of workers' compensation. Montana only recently enacted legislation to allow the development of managed care organizations and subsequently to benefit from the education of medical providers that results from the development.

Representative Hibbard said that there are many forms that 24-hour coverage can take. He asked if from an overall standpoint, will 24-hour coverage truly create savings and where would the savings come from? Representative Hibbard felt that if 24-hour coverage did not provide cost savings or provide better service, there was not much point in pursuing it. Mr. Wood said that the savings that would come from avoiding duplication does not exist for his employers because the same employees' list is used and a determination is made as to whether an injury is covered by health and accident insurance before it is ever reported. If 24-hour coverage is pursued, many employers would also be asked to provide a benefit that they are not now providing and their costs would increase.

> Ms. Harmon added that Oregon is in a different situation because it is facing an employer mandate for health insurance coverage. If Oregon can get an ERISA waiver, then the mandate will go into effect in 1997. Ms. Harmon said if Montana is trying to save costs, it should try to get its house in order first. Do not enlarge the problems that Montana is facing by joining up with another system. Montana should try to save costs in its existing system

first, then if it wants to take the next step, it makes sense. There are many things that Montana could do to save costs that do not involve 24-hour coverage.

Mr. Shannon said that cost savings could be done on both sides without 24-hour coverage by opening the communication lines between workers' compensation and health insurance to get the claims to the right place more efficiently. It could also address duplication and fraud issues.

. . .Senator Toews said that the 24-hour coverage legislation was initiated with the concept that companies would move into the state and provide coverage through an entity other than the State Fund. He asked if employers were pulling out of Oregon's State Fund or staying in it as a result of the 24-hour coverage pilots. Ms. Harmon said the Oregon State Fund has approximately one-third of the market. Senator Toews asked if other companies had moved to Oregon as a result of its blended plan. Ms. Harmon believed there was the potential for this happening, but she did not know how big the potential was.

. . .Representative Cocchiarella asked if she was correct in assuming that a state needed managed care in order to make 24-hour coverage work. Ms. Harmon said it would be difficult to make 24-hour coverage work without it.

Representative Cocchiarella asked if the freedom of choice of physicians was taken away in Oregon. Ms. Harmon said workers who are not covered by an MCO have freedom of choice with three attending physicians throughout the life of a claim. Workers who are in an MCO, but not in the pilots, are not required to go into the MCO until the claim is accepted. Workers who are involved in the pilot program are in the MCO from the moment they file a claim.

. . .Ms. Harmon said the premise is that Oregon will see cost savings. The programs sunset in July of 1998, and it will be several years before any data will be available. Representative Elliott asked if an employer was getting any type of premium reduction from the State Fund for participating in the pilot project. Ms. Harmon said not yet. However, on the coordinated model the private carrier asked the Insurance Commissioner and received a 5% reduction in their premiums based on the potential cost savings.[19]

Concern was expressed for small businesses; if workers' compensation costs continue to rise and additional mandates for health insurance are added, many small employers may go out of business. Public testimony was taken. The

Subcommittee discussion follows.Representative Brandewie said that there are so many more questions than there are answers and there is no proof that a 24-hour system will save money for Montana. He felt that with the ERISA issue, it was not wise for Montana to jump into any new program. In addition, the Subcommittee did not know what the Montana Health Care Authority and national health care reform is going to do. The 1993 Legislature passed good legislation dealing with the workers' compensation issue. He felt that Montana was moving in the right direction and should wait and see if the cost of workers' compensation premiums could be brought down with the system that is in place and the new managed care organizations. A future legislature could proceed when there is more information available on how 24-hour coverage works.

Senator Toews said that in the beginning, he wanted 24-hour coverage and felt that it was a concept that could work. However, at this point, he saw no great cost savings. In his opinion, the whole point of 24-hour coverage was to get workers out of the State Fund and move them toward the private carrier. In the discussions at this meeting, the State Fund would still be a part of 24-hour coverage. He felt that this concept would not work because the State Fund is not going to get into the health care business and he could not see the State Fund offering discounts to companies. He would rather see the State Fund totally out of the picture. Senator Toews felt that Montana would be better served to let the other states make the mistakes first and then Montana could revisit the 24-hour coverage issue in the future.

Representative Elliott said that 24-hour coverage is not right for Montana at this time. He also believed that the high workers' compensation premiums were the single largest disincentive for the expansion of business in Montana. Because of this, Representative Elliott felt that Montana still needed to review other alternatives, such as the optional coverage system in South Carolina--the state gets out of workers' compensation and the private insurer provides liability, disability, and health care coverage.

Representative Cocchiarella said the positive turnaround seen recently in the State Fund is the result of legislation enacted in the 1987 and 1993 Regular Sessions. Montana is in a different place than Oregon, and she felt that Montana must sit back and take a look at the results of its legislation before it takes a giant leap into 24-hour coverage.

Representative Duane Grimes said that during the 1993 Regular Session, there was the debate that the Legislature was not looking as hard as it needed to at alternatives to workers' compensation. After reviewing the complexities of 24-hour coverage, Representative Grimes felt that there was no way Montana should jump into a 24-hour program with as little information as it has. He felt that the Subcommittee should look at other alternatives, such as South Carolina as suggested by Representative Elliott. He said that the Legislature has accomplished part of its original goal of reviewing every viable alternative to the current system in Montana. However, he believed it a good idea to review other alternatives from other states. He also had no problem with a negative subcommittee report on launching 24-hour health care at this time.

Representative Hibbard said there was Subcommittee consensus that, at this time, pursuing the concept of 24-hour coverage in Montana was not a good idea and that the recently enacted legislation needed to be given time to work before jumping into another program[20].

The 24-Hour Coverage Subcommittee reported its findings to the full Subcommittee, and the full Subcommittee concurred in the 24-Hour Coverage Subcommittee's recommendation not to pursue 24-hour coverage any further. The members of the 24-Hour Coverage Subcommittee requested further information on the nonsubscription alternative.

NONSUBSCRIPTION OR "OPTING OUT" OF WORKERS' COMPENSATION

Nonsubscription refers to allowing employers to choose to not purchase workers' compensation coverage and therefore be subject to tort action. Many states require that employers cover, or many employers voluntarily cover, their employees with a combination of health and accident and disability insurance. The full Subcommittee received information from the states of Texas and South Carolina, which allow nonsubscription of workers' compensation insurance. These states have never had mandatory workers' compensation coverage, so their circumstances are somewhat different from Montana, which has mandated workers' compensation coverage since its inception. A suggestion was made at the June meeting to further study this alternative to workers' compensation, but the Subcommittee did not pursue this option.

CHART I - TYPE OF LAW AND INSURANCE REQUIREMENTS -
JANUARY 1, 1994

State	Type of Law	Insurance	Self-Insurance	Penalties on Failure to Insure
Montana	Compulsory	Required	Individual and group	Division must enjoin employer from doing business. Double amount of unpaid premiums assessed as penalty (minimum, $200). Employer liable for compensation payable up to $50,000. Employer automatically negligent if no coverage obtained. Penalties payable to Uninsured Employers' Fund.
New Jersey	Elective†	Required - unless employer rejects.	Permitted	Uninsured employers are subject to fine of $1,000 and an assessment of 15% of any award not to exceed $5,000. Willful failure to provide insurance is a crime of the fourth degree. In addition, an assessment of $1,000 may be imposed for every 10 day period that insurance is not provided.
South Carolina	Elective	Required	Individual and group	If employer does not reject and fails to insure, fine of 10 cents per day per employee (maximum $50, minimum $1 per day); if default continues for 30 days employer may be enjoined from doing business. Employer liable to suit with defenses abrogated. Willful failure to insure is misdemeanor punishable by fine of $100 to $1,000 or imprisonment of 30 days to 6 months, or both.
Texas	Elective	Required	Permitted, except for state and political subdivisions	Employer liable to suit with defenses abrogated.

† New Jersey - Statutory presumption of compulsory inclusion in every contract of hire since July 4, 1911. To elect not to be covered by the Workers' Compensation Act requires a clear and unambiguous written agreement between employee and employer 60 days prior to the happening of an accident.

CHART II - COVERAGE OF LAWS - JANUARY 1, 1994

State	Employment Covered - Private	Employment Covered - Public	Exceptions	Special Coverage Provisions
Montana	Compulsory as to all employments. Corporate officers may reject. Partners and sole proprietors may apply for an exemption.	Compulsory as to all public employments, including public contractors and volunteer rescue workers.	Domestic and casual employment; family members; employers covered by federal law; person performing services for aid and sustenance only; officials at amateur athletic events; real estate brokers and salespersons; direct sellers of consumer goods; dependent member of employer's family for whom a federal tax exemption may be claimed; newspaper carriers and free-lance correspondents; cosmetologists; and barbers.	Coverage is mandatory for partner or sole proprietor who is independent contractor, but may apply for personal exemption. Voluntary as to exempt employments.
New Jersey	Statutory presumption of election as to all employments.	Compulsory as to all public employments.	Casual workers, maritime workers, and railroad workers engaged in interstate commerce.	
South Carolina	Compulsory as to all employers of 4 or more, including active partners and sole proprietors whose employees are eligible for benefits.	Compulsory as to all public employments except elective and appointive officials. Coverage extended to members of the State and National Guard.	Casual employees, persons engaged in selling agricultural products, farm labor, railroads, express companies, state and county fair associations, employer with annual payroll under $3,000 and licensed real estate agents who are independent contractors, working on straight commission and working for a broker.	Voluntary as to excluded employments.
Texas	Elective as to all employments. Farm/ranch operator may elect to cover self, partner, corporate officer or family member.	State provides self-insurance coverage for Highway Depart., University of Texas, Texas A&M University and all state employees. Counties, municipalities and other political subdivisions may provide compensation for their employees.	Domestic or casual workers engaged in employment incidental to a personal residence; persons covered by a method of compensation established under federal law; migrant workers; seasonal workers employed on a truck farm, orchard or vineyard, or employed by an employer with a payroll under $25,000; and other farm or ranch employees working for an employer with a payroll under $25,000, or employing fewer than 3 workers.	

Excerpted from: 1994 Analysis of Workers' Compensation Laws, U.S. Chamber of Commerce.

ENDNOTES

1. 1992 Analysis of Workers' Compensation Laws, U.S. Chamber of Commerce (Washington, D.C.), p. vii.

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Chapter Three

REFORM OVERVIEW

Workers' compensation in Montana has been evolving slowly with regular reforms since 1987. The 1993 Legislature passed a package of significant legislation affecting the areas of safety, medical cost containment, fraud, a workers' compensation data base, and the Old Fund unfunded liability tax. The Subcommittee received regular updates on the progress of these and other programs. Other issues that the Subcommittee tracked during the interim included: administrative assessments, the change in the method of premium collection, the issue of limited partnerships, and the assessment of the Old Fund unfunded liability tax. The Subcommittee meetings became a forum for the agencies to explain their progress and the successes and frustrations along the way. The meetings enhanced interagency coordination as the Subcommittee members asked for information in order to better understand the programs and the agencies' interaction.

SAFETY

The Montana Safety Culture Act (Senate Bill No. 163, Ch. 295, L. 1993) will affect almost everyone in the State of Montana--as an employer, as an employee, or as a student. The idea is to eventually make safety a part of everyday culture. Montana can then become a safer place to work and a better place to do business as the workers' compensation insurance rates stabilize to reflect safe work practices. Depending on the number of employees, the Act requires safety orientation for employees, self-inspections, safety meetings, and documentation of a safety program. A requirement for

safety committees has caused considerable debate, and the Department of Labor and Industry (DOL) has worked with the National Labor Relations Board to develop new rules. Continuing debate on the safety committees is expected.

The Safety Employment Education and Training Advisory Committee, administered by DOL, worked with employers, insurance companies, and state agencies to develop "user-friendly" administrative rules that became effective May 1, 1994. The next phase is development of an educational delivery system to bring the message to Montana's children and young adults. The DOL Safety Bureau provides safety brochures for all industries and provides other resources to the public (also available on the state electronic bulletin board). Each insurer is the enforcement agent, and because the State Fund currently has the greatest market share, including state agencies, it will consult with individual employers and agencies to help put safety programs together. The DOL also publishes a quarterly newsletter that it sends to all employers.

In working to implement the Montana Safety Culture Act, the State Fund has hired more employees to assist employers to audit workplaces and to give advice on how to set up a safety program. The State Fund also is developing a library of information that is available to its insureds for assistance in developing safety programs. The State Fund created a new Loss Control and Premium Audit Department and 250 accounts with high losses have been selected on which to focus the provision of safety services. The State Fund and the Department of Administration Risk Management and Tort Defense Division are working with state agencies on developing safety plans.

MEDICAL COST CONTAINMENT

Medical cost containment in traditional health care is commonly found in managed care and preferred provider organizations. However, because of the unique nature of the workers' compensation system, cost containment is a new concept that requires further refining.

In 1993, Senate Bill No. 347 (Ch. 628, L. 1993) provided for the use of managed care and preferred provider organizations in the workers' compensation system. As the first step, the DOL was responsible for developing administrative rules for managed care certification by the Workers' Compensation Regulation Bureau in the Employment Relations Division. The rules were developed by the DOL and an advisory committee of legislators, insurers, and medical providers and were in place by March 1, 1994. The DOL has received many applications from managed care organizations across the state, and most of the applications have received preliminary approval. The DOL reported that by September 1994, three managed care organizations were fully certified.

The second step allows each insurance company that carries workers' compensation insurance to contract with certified managed care organizations and to develop its own preferred providers. The DOL is also responsible for developing a system to regulate hospital rates and for establishing a medical committee to develop treatment guidelines for workers' compensation.

The State Fund has been working diligently to assist the medical community in understanding workers' compensation, and the process has helped the insurer

to better understand the medical communities' needs. The State Fund has been encouraged by its negotiation efforts and by the prospects for managed care.

The State Fund also has strived to put in place preferred provider organizations. It is targeting areas that are not usually fee-scheduled, such as durable medical goods and pharmacy reimbursements. The goal of using preferred providers is to control costs and to ensure that quality products and services are available to insured employees.

Copayments were also authorized but have not been used by the State Fund to date. As soon as the managed care organizations are up and running, the copayment provisions will begin. Copayments have been used by some private workers' compensation insurance carriers.

FRAUD

Significant fraud reform was passed in 1993 (Senate Bill No. 164, Ch. 296, L. 1993). The definition of fraud and the differentiation between fraud and abuse are a difficult determination. The Subcommittee members revisited the issue many times in order to fully understand the distinction. The statutory equivalent for fraud is theft. In order to prosecute for fraud, the evidentiary standards for theft must be met and the question of intent is raised. There are also numerous state agencies involved in investigating and prosecuting workers' compensation fraud cases. The Department of Justice, DOL, and the State Fund are all involved in a coordinated effort of fraud prevention and prosecution, joined by local County Attorneys and other state agencies, such as the Departments of Revenue and Social and Rehabilitation Services.

A fraud and abuse hotline (1-800-922-2873) has been set up in the Office of Citizens' Advocate that fields calls regarding suspected fraud and abuse in workers' compensation, unemployment insurance, and welfare. Depending on the insurer of the employer, the workers' compensation calls are fielded to the DOL (for Plans No. 1 and 2 and uninsured or underinsured employers) or to the State Fund (for Plan No. 3), which in turn may refer a case to the Department of Justice. Television publicity spots have been produced featuring Attorney General Joe Mazurek and Rick Hill, State Fund Chairman, encouraging people to call in if they suspect fraud and abuse in workers' compensation.

One example of the regular interagency coordination between the Department of Justice, the DOL, and the State Fund is in the form of monthly fraud meetings that result in referrals for criminal prosecution, trouble-shooting, and discussion of new avenues for detection. The agencies have sponsored training on how to recognize and prevent premium fraud for all of those working on the fraud team. Fraud can happen in workers' compensation claims by employers, employees, or medical providers.

The Uninsured Employer Program within the DOL is another fraud program that detects and investigates fraud, specifically by employers who do not have workers' compensation insurance. The program attempts to bring employers into compliance, audits and penalizes uninsured employers, and pays benefits to workers injured while employed by an uninsured employer.

Through this program (through June 1994), 445 employers were penalized for over $1.8 million and the DOL had collected $700,000. The number of cease-and-desist orders totaled 119, and there have been 35 cases for violation of cease-and-desist orders or for operating knowingly without workers'

compensation. In addition, the DOL has covered 67 claims filed by uninsured workers.

The DOL also has a new Underinsured Employer Program that investigates and detects fraud that is committed by employers misrepresenting classification codes. The program is in its infancy, and the DOL is developing information sources, working with the Department of Revenue, the Labor Standards Bureau, the Unemployment Insurance Division, the Safety Bureau, the Northwest Fair Contracting Association, and others. The DOL has sent letters to employers and to private insurers to make them aware of the new program. In addition, the program will be working with the State Fund for audit information. Legislation may be pursued in 1995 to alleviate problems in the new program.

Both programs receive referrals from the fraud and abuse hotline, and both receive referrals from and send referrals to the State Fund fraud and audit units.

The Department of Justice has successfully organized a fraud team of investigators, a prosecutor, and support staff. The Department may assist County Attorneys in the prosecution of fraud cases or will handle those cases at the request of the counties. As of September 1994, 21 cases had been referred to the County Prosecutor Services Bureau in the Attorney General's Office--20 cases from the Criminal Investigation Bureau and 1 case from local law enforcement, which detected workers' compensation fraud in the course of a theft investigation. Six of the 21 cases have been closed. There are also 11 cases pending in various courts throughout the state. As the prosecutor travels the state, she has found a lot of support from the people who are aware of the program. There has also been increased cooperation and support from doctors. There were four cases pending prosecution, one involving a large

employer. The workers' compensation prosecutor has also been acting in a support position to the Criminal Investigation Bureau by answering questions, investigating premiums, and providing training to the State Fund and County Attorneys.

The State Fund fraud unit has worked on 337 cases involving 70 employers, 2 providers, and 265 claimants. This number does not include the hundreds of fraudulent complaint calls received. The State Fund has contracted with a nationwide data base company that collects filed-injury claim reports. All new claims are going through the system, and reports are sent back on anyone who has had a previous claim. The purposes of the data base are to: (1) catch the professional workers' compensation artist who works from state to state; (2) detect claims that are being filed for the same injury that may have potential for subrogation; and (3) find previous bodily injuries that are similar to the one the claimant has just filed so that the fraud unit can do damage control on the claim.

The State Fund recently reported that the fraud investigation program has saved about $1.5 million in the last year. Fraud investigation, enforcement, and prosecution should add up to savings for insurance companies. These actions also should provide restitution that could positively affect premiums and provide a deterrent effect by letting people know that fraud in all areas will not be tolerated.

State Fund has developed a fraud indicator checklist for claims and for the fraud tips received. It has also developed a brochure to educate employers on what to do if fraud is suspected and how to prevent fraudulent claims.

OLD FUND UNFUNDED LIABILITY TAX

The Old Fund unfunded liability tax (OFLT) was created in the 1993 Legislative Session (House Bill No. 504, Ch. 637, L. 1993) to spread the burden for the Old Fund unfunded liability from the employer payroll tax enacted in 1990 (Ch. 4, Sp. L. May 1990) to all employers, employees, and the self-employed in Montana. The Department of Revenue (DOR) administers the tax and presented administrative issues that have arisen to the Subcommittee. These issues may result in legislation in the 1995 session.

- The benchmark for determining the taxability of other income is whether the income is derived from an "ongoing activity". A definition or clarification of ongoing activity is needed.

- The focus on source income causes problems. The taxpayer is subject to the OFLT for each entity in which a taxpayer is involved and derives ordinary income on Montana earnings. This causes problems for an entity if it is a multistate business operating in Montana and must allocate income to Montana as well as places outside of Montana. A solution would be to clarify that only Montana-source income is taxable for the OFLT.

- The definition of "ordinary income" is also in need of clarification. The OFLT is to be applied to ordinary income, business income, and wages. The question arises as to whether interest income derived by a partnership is subject to the OFLT. A solution is to clarify that partnerships may have income other than "ordinary income" that is not taxable for the OFLT.

- Clarification needs to be made on whether the limited partnership is an investment vehicle or a business income vehicle because ordinary income from a limited partnership is subject to the OFLT, unless the limited partnership is traded over the counter.

- If 50% of the stock in a closely held corporation is held by five or fewer shareholders, the wages of the officers are not subject to the 0.5% employer portion of the OFLT, regardless of whether the officers are

shareholders of the corporation. The DOL believes that the intent was to exempt shareholders who are officers and not all of the officers within the closely held corporation. A potential solution would be to clarify that only wages paid to officers who are shareholders are exempt from the 0.5% OFLT.

- By definition, rental income and loss are passive. However, if a business is a rental business, its income or loss would be subject to the OFLT. The question is whether the business is a rental business or a passive investment. A possible solution is to clearly state that rental income is or is not subject to the OFLT.

- The law does not specifically state that only wages earned in Montana are subject to the employer and employee portions of the OFLT. A possible solution would be to amend the law to clarify that the OFLT is imposed on wages, compensation, income earned in Montana, or income attributable to Montana sources.

- The DOR wishes direction on whether it should be consistent with federal law and only tax interstate transportation workers in their state of residence or whether it should follow the source income and try to determine the workers' wages earned in Montana for the purpose of applying the OFLT. A possible solution would be to clarify when wages paid to interstate transportation workers are taxable for OFLT purposes.

WORKERS' COMPENSATION DATA BASE

A plan for a workers' compensation data base system was passed in the last Legislature (House Bill No. 511, Ch. 512, L. 1993). As of the September meeting, the data base was on time, on budget, and tied into a national effort. The design phase of the system is complete, and some modules are being tested by users. The system will be fully operational by July 1995. The data base process is also resulting in some DOL business changes, such as the ability to move a paper process to an electronic process.

The data base legislation included addressing the issue of legal costs and how they will be tracked in the system. The original Data Base Task Force concluded that legal costs, particularly on a per-attorney basis, were a nonissue, and the Task Force did not want to deal with them. The DOL felt it had somewhat of a mandate to review the issue. Therefore, it formed a Legal Cost Task Force to deal with this specific issue. Rules have been proposed to get both defense and plaintiff information, but it will not be tracked on an individual attorney basis. Rolled-up costs will be received, and there will no longer be the listing of attorneys and how much money each made--a recommendation made by insurers who felt that advertising for workers' compensation attorneys was not good business in Montana. The Legal Cost Task Force was composed of plaintiff and defense attorneys, and this was the Task Force's best effort to come up with what is important information for the system to have.

SUMMARY

The Joint Subcommittee on Workers' Compensation Alternatives reviewed multiple issues and became an effective forum for reviewing workers' compensation reform and uncovering new issues that the Legislature is likely to see in the 1995 Legislative Session.

The Subcommittee reviewed a significant alternative to workers' compensation--24-hour coverage. After reviewing a significant amount of information in a short period of time, the Subcommittee concluded that Montana is not in a position to pursue 24-hour coverage at this time. The Subcommittee reached this conclusion from information received about how past implementation of managed care and other reforms placed Oregon in a feasible position to implement 24-hour coverage. It was apparent to the Subcommittee members that many of the reforms that the Legislature enacted in 1993 could place Montana well on its way to a better workers' compensation environment. Many of the reforms will provide cost containment and may position Montana in the future to be able to consider 24-hour coverage more seriously.

Health care reform on a state and national level will affect health care delivery systems in general and will affect workers' compensation medical benefits as well. The Subcommittee believed it was best to let those reforms also develop and to monitor the effects on the workers' compensation system.

Another alternative to workers' compensation, that of nonsubscription or "opting out" of workers' compensation, was considered to the extent that research materials were provided to Subcommittee members. The

Subcommittee did not feel compelled to explore the issue further because there was only limited interest.

The Subcommittee created a forum for state agencies and the State Fund to report their progress on the various reforms. Dialogue between agencies was encouraged, and the Subcommittee benefited from the ongoing progress reports received. Areas of frustration for Subcommittee members created an impetus for agencies to address issues and present solutions to the Subcommittee.

The Subcommittee became an effective outlet for the raising of additional workers' compensation issues. When the State Fund proposed changing its premium collection method, the Subcommittee asked for presentations. The opportunity enabled the State Fund chairman to explain the State Fund's perspective to a group of interested legislators and others. The presentation assisted legislators in being able to respond to the concerns raised.

After the issues of the independent contractor exemption and the employee leasing concerns were raised, the Subcommittee members invested the time to educate themselves on the problems and proposed solutions in the areas. The Subcommittee brought the respective interested or affected parties together for information sharing and encouraged them to work together before the session to create solutions agreeable to all parties. The Subcommittee's philosophy was one of letting the affected parties create their own solutions. A report, Workers' Compensation Emerging Issues: Independent Contractors, Contractor Licensing, and Employee Leasing, was prepared by the Subcommittee staff to provide background information to the 1995 Legislature.

Senator Harp summed up the Subcommittee's interim activities by stating that the Subcommittee offers the Legislature members who are better educated in many of the areas of workers' compensation reform. The Subcommittee members will be able to provide their expertise and understanding of workers' compensation issues in the 1995 Legislative Session.

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APPENDIX A

SELECTED WORKERS' COMPENSATION LEGISLATION PASSED BY THE 1993 MONTANA LEGISLATURE

Senate Bill No. 91 (Christiaens) extends workers' compensation to certain inmates employed while participating in prerelease center programs and diversionary programs. (Ch. 457, L. 1993)

Senate Bill No. 163 (Harp, by request of the Governor) creates the Montana Safety Culture Act; requires employers to establish safety, training, and education programs; requires insurers to provide safety consultation services; grants immunity to insurers for certain occurrences; creates a Safe Employment Education and Training Advisory Committee; and allows the State Fund to implement variable pricing levels and charge a 20% surcharge on high-loss employers. (Ch. 295, L. 1993)

Senate Bill No. 164 (Harp, by request of the Governor) creates a Workers' Compensation Fraud Investigation and Prosecution Office in the Department of Justice and a Workers' Compensation Fraud Prevention and Detection Unit in the State Fund and clarifies criminal penalties for workers' compensation fraud. (Ch. 296, L. 1993)

Senate Bill No. 256 (Swysgood) defines nonresident employee or worker in Montana for workers' compensation purposes, provides for election of coverage of certain nonresidents, and requires out-of-state employers engaged in construction to obtain coverage for their out-of state employees. (Ch. 458, L. 1993)

Senate Bill No. 347 (Harp, by request of the State Fund) generally revises workers' compensation law for better medical cost containment, revises

freedom of choice of medical provider, and provides for the use of managed care and preferred provider arrangements. (Ch. 628, L. 1993)

Senate Bill No. 381 (Forrester) penalizes an employer misrepresenting an employee in order to pay lower workers' compensation premiums. (Ch. 467, L. 1993)

House Bill No. 13 (Benedict) generally revises workers' compensation law, clarifies the compensability of mental stress claims, revises the State Fund's budgeting and funding procedures, exempts the State Fund from the Montana Administrative Procedures Act for purposes other than ratemaking, authorizes the Legislative Auditor to review rates and examine the State Fund each year, and requires insurers to notify claimants of benefits and entitlements with information provided by the Department of Labor. (Ch. 630, L. 1993)

House Bill No. 287 (Wiseman, by request of the Department of Labor) generally revises the Workers' Compensation Act and the Occupational Disease Act of Montana. (Ch. 555, L. 1993)

House Bill No. 453 (Molnar) creates civil penalties to be assessed by the Department of Labor and Industry against persons convicted of theft for workers' compensation fraud, and directs that the money collected be used to administer the provisions of the bill. Any excess money collected is to be used to support the investigation and prosecution of workers' compensation fraud. (Ch. 618, L. 1993)

House Bill No. 504 (Benedict, by request of the Joint Select Committee on Workers' Compensation) creates the workers' compensation old fund liability tax by increasing the employer payroll tax and expanding the tax base to

include employees and others receiving compensation in Montana. The proceeds are to be used to eliminate the State Fund's "old fund" unfunded liability. (Ch. 637, L. 1993)

House Bill No. 511 (Hibbard) directs the Department of Labor and Industry to develop a workers' compensation data base system to generate management information on Montana's workers' compensation system. (Ch. 512, L. 1993)

House Bill No. 534 (Cocchiarella) clarifies that workers' compensation rates and rating plans must be developed without regard to medical deductibles paid. (Ch. 248, L. 1993)

House Bill No. 587 (Harper, by request of the State Auditor) revised the provisions relating to workers' compensation Classification and Rating Committee. (Ch. 528, L. 1993)

House Bill No. 621 (Elliott) revises the method of recognizing differences in rates of pay with respect to establishing workers' compensation insurance premiums for the construction industry. (Ch. 224, L. 1993)

House Bill No. 622 (Ewer) generally revises workers' compensation and occupational disease (OD) laws; provides for suspension of benefits to a worker who fails to keep medical appointments; designates liability for OD benefits if there is more than one insurer; allows optional deductibles; requires revocation, suspension or denial of professional licenses for violation of workers' compensation laws; precludes liability for reporting violations; requires the State Fund Board of Directors to adopt a business plan; and allows insurers to suspend benefits to workers receiving social security disability benefits. (Ch. 619, L. 1993)

House Joint Resolution No. 14 (Wagner) directs the State Fund to reduce workers' compensation premiums for yew bark peelers and truck drivers.

House Joint Resolution No. 33 (Grimes) directs an interim committee to study 24-hour health care coverage and other alternatives to the present workers' compensation system and to review the workers' compensation legislation passed by the 53rd Legislature.

APPENDIX B

GLOSSARY OF WORKERS' COMPENSATION TERMS*

AVERAGE WEEKLY WAGE

The mean weekly earnings of all employees under covered employment, defined and established annually by the Department of Labor and Industry and adopted prior to July 1 of each year. (See 39-71-116, MCA.) The current average weekly wage, adopted July 1, 1993, is $362.

EXCLUSIVE REMEDY

The concept that in the act of an employer providing an employee with workers' compensation insurance coverage, an employee gives up the right to any other legal remedy in return for the employer's responsibility to provide compensation for work-related injuries and illnesses.

IMPAIRMENT RATING

A medical determination of a worker's physical impairment, typically given as a percentage figure.

INDEMNITY BENEFITS

The benefits associated with lost wages due to a workplace injury.

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* This glossary was patterned after the ERD (Employment Relations Division) "CHEAT SHEET" OF WORKERS' COMPENSATION TERMS presented in the 1993 Session by the Department of Labor and Industry. It has been updated with statutory citations and terminology from 1993 legislation.

LUMP SUM

A payment or settlement that represents the combined amounts of a number of weeks of benefits owing or due; in essence an agreement to make payments in a lump sum rather than over a period of time. This term is always related to indemnity benefits.

MAINTENANCE CARE

Treatment designed to provide the optimum state of health while minimizing recurrence of the clinical status. (See 39-71-116, MCA.)

MANAGED CARE

A strategy for controlling medical costs related to a workers' compensation claim by managing the care a worker receives and attempting to ensure that proper treatment is given; therefore eliminating unnecessary treatment and cost.

MAXIMUM HEALING

See **MEDICAL STABILITY**

MEDICAL BENEFITS

Benefits that represent payments made by the insurer to medical providers for treatment of a worker's injury.

MEDICAL STABILITY, MAXIMUM HEALING, OR MAXIMUM MEDICAL HEALING

A point in the healing process when further material improvement would not be reasonably expected from primary medical treatment. (See 39-71-116, MCA.)

NEW FUND

All claims, payments, and liabilities related to claims filed with the State Compensation Insurance Fund on or after July 1, 1990.

OCCUPATIONAL DISEASE or OD

Similar to definition of injury, but not limited to a single incident or event. It is an accumulation of happenings or conditions over more than one work shift that results in disability. (See Title 39, chapter 72, MCA.)

OLD FUND

All claims, payments, and liabilities related to claims filed with the State Compensation Insurance Fund prior to July 1, 1990, when the State Fund was split into "old" and "new". All claims filed on or after July 1, 1990, are handled by the "new fund". See **NEW FUND**.

PALLIATIVE CARE

Treatment designed to reduce or ease symptoms without curing the underlying cause of the symptoms. (See 39-71-116, MCA.)

PERMANENT PARTIAL DISABILITY or PPD

PPD is a condition after a worker has reached maximum medical healing, in which a worker (1) has a medically determined physical restriction as a result of an injury, as defined in 39-71-119, MCA; and (2) is able to work in some capacity but the physical restriction impairs the worker's ability to work. (See 39-71-116, MCA.) PPD benefits are 66 2/3% of the worker's wage at the time of injury, not to exceed one-half of the state's average weekly wage. (See 39-71-703, MCA.)

PERMANENT TOTAL DISABILITY or PTD

PTD is a condition that results from an injury, as defined in 39-71-119, MCA, after a worker has reached maximum medical healing, and in which a worker does not have a reasonable prospect of physically performing regular employment. (See 39-71-116, MCA.) PTD benefits are 66 2/3% of the worker's wage at the time of injury, up to a maximum amount of the state's average weekly wage. (See 39-71-702, MCA.)

PLAN NO. 1, SELF-INSURERS, DIRECT PAYMENT BY EMPLOYER

A workers' compensation insurance plan for self-insured employers. Participation must be authorized by the Employment Relations Division of the Department of Labor and Industry. Each self-insured employer acts as its own insurance company, paying claims, setting aside reserve funds for future liabilities, etc. There are approximately 55 self-insured employers. (See Title 39, chapter 71, part 21, MCA.)

PLAN NO. 2, INSURANCE OF LIABILITY

A workers' compensation plan under which employers insure liability with private insurance carriers that are licensed to write workers' compensation insurance policies in Montana. Over 200 private insurance carriers are licensed by the Insurance Commissioner in the State Auditor's Office, although only a small percentage currently write policies in Montana. (See Title 39, chapter 71, part 22, MCA.)

PLAN NO. 3, STATE FUND

The State Compensation Insurance Fund or the State Fund, composed of the "old fund" (claims prior to 7/1/90) and the "new fund" (claims on or after 7/1/90). The majority of workers' compensation insurance in

Montana is purchased through the State Fund. (See Title 39, chapter 71, part 23, MCA.)

PRIMARY MEDICAL SERVICES

Treatment necessary for achieving medical stability, prescribed by a treating physician for conditions resulting from the injury. (See 39-71-116, MCA.)

SECONDARY MEDICAL SERVICES

Those medical services or appliances not medically necessary for medical stability. The services and appliances include but are not limited to spas or hot tubs, work hardening, physical and other restoration programs designed to address disability and not impairment, or equipment offered by various providers. (See 39-71-116, MCA.)

STATE FUND or STATE COMPENSATION INSURANCE FUND

See **PLAN NO. 3**.

TEMPORARY PARTIAL DISABILITY or TPD

Temporary benefits paid to an injured worker if, prior to maximum healing, the worker has a physical restriction, returns to work in a modified or alternative employment, and suffers a partial wage loss. (See 39-71-116, MCA.) The benefits are the difference between the injured worker's average weekly wage at the time of injury and the actual weekly wage being earned while temporarily partially disabled, not to exceed the injured worker's temporary total disability benefit rate. (See 39-71-712, MCA.)

TEMPORARY TOTAL DISABILITY or TTD

A condition resulting from an injury that results in total loss of wages and exists until the worker reaches maximum medical healing. (See 39-71-116, MCA.) Temporary total benefits are 66 2/3% of the worker's wage at the time of injury, not to exceed the state's average weekly wage. (See 39-71-701, MCA.)

TIME LOSS BENEFITS

The benefits associated with lost wages due to a workplace injury.

TREATING PHYSICIAN

A person who is primarily responsible for the treatment of a compensable injury and who is a licensed physician, a licensed chiropractor, a licensed physician assistant-certified in certain instances, a licensed osteopath, or a licensed dentist. (See 39-71-116, MCA.)

UNFUNDED LIABILITY

The amount of money the State Fund does not have, but should have reserved to pay all current claims. The unfunded liability is the projected total cost of all claims, minus the assets on hand to pay those claims.

WORKERS' COMPENSATION

Insurance provided by employers to workers for occupational-related injuries. In return, workers agree to give up their right to legal remedy, thereby making workers' compensation the "exclusive remedy". (See Title 39, chapter 71, MCA.)

APPENDIX C

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